

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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Order Instituting Rulemaking To
Implement Portions of AB 117
Concerning Community Choice
Aggregation.

Rulemaking 03-10-003
(Filed October 2, 2003)

**PETITION OF THE CITY AND COUNTY OF SAN FRANCISCO
TO MODIFY DECISION 05-12-041
AND REQUEST FOR EXPEDITED CONSIDERATION**

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"PG&E has stated before and states again that CCA is a consumer choice alternative that should be enabled . . ."

-- Comments by PG&E to CPUC, Nov. 22, 2005

" . . . we are going to stand up and resist efforts to take over our customers, and those efforts by municipal government."

-- Peter Darbee, Chairman, CEO and President of PG&E Corp., Oct. 29, 2009

**PETITION OF THE CITY AND COUNTY OF SAN FRANCISCO
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I. INTRODUCTION AND SUMMARY

In accordance with Rule 16.4 of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission" or "CPUC"), the City and County of San Francisco ("CCSF" or "the City") hereby submits this petition for modification of Decision ("D.") 05-12-041 ("the Decision") and request for expedited consideration. This petition is necessary because one of the Decision's key assumptions – that the utilities were neutral (or even supportive) toward community choice aggregation ("CCA") programs – is no longer true, as evidenced by the very public reversal by at least one utility, Pacific Gas & Electric ("PG&E"), from a stance of support to staunch opposition to CCA programs. PG&E has now made it a high corporate priority to prevent the success of any CCA program in its service territory.

PG&E's concerted efforts to undermine and defeat CCA programs fundamentally conflict with California law affording local governments the right to offer consumers an electric supply alternative to the monopoly utilities. In addition, such efforts specifically and directly violate the utilities' statutory obligation to cooperate fully with CCA programs, pursuant to Public Utilities Code Section 366.2(c)(9).¹

¹ All statutory references are to the California Public Utilities Code, unless otherwise indicated.

This petition requests that the Commission protect the statutory rights of local governments and enforce the utilities' statutory obligation to cooperate fully with CCA programs by modifying the Decision in the following respects: (1) prohibiting utilities from engaging in marketing to retail customers regarding a CCA program or programs; (2) prohibiting utilities from engaging in other conduct that is detrimental to and designed to thwart a CCA program or programs (except to the extent that such conduct is clearly constitutionally protected); (3) prohibiting utilities from soliciting opt-out requests or dictating the opt-out mechanism, except when requested to do so by a CCA program; (4) prohibiting utilities from making deceptive, misleading or untruthful statements regarding a CCA program or programs; and (5) establishing an expedited process for CCA programs to obtain temporary injunctive relief against a utility that is alleged to have violated its obligations toward such programs. The specific requested changes to the Decision are set forth in Appendix A to this petition. The Commission should also investigate PG&E's violations of California law and Commission rules in its anti-CCA marketing efforts. At this time, CCSF has focused on the prospective changes necessary to prevent further harm to the success of CCA programs, rather than on the appropriate sanctions for PG&E's misconduct.

The requested modifications are necessary to prevent or mitigate: (1) unwarranted interference with the right of local governments to offer consumers an alternative – and in San Francisco's case, a greener – source of electric supply; (2) a violation of the utility's statutory duty to fully cooperate with CCA programs; (3) anti-competitive leveraging of the utilities' monopoly advantages; and (4) customer confusion created by utility scare-mongering. The requested changes are urgently needed to prevent well-financed and broad-based utility attacks on CCA from rendering the Legislature's carefully crafted CCA law a meaningless piece of paper. Accordingly, CCSF urges the Commission to give this petition expedited consideration.

II. BACKGROUND

A. Decision 05-12-041 and the Commission's Findings

The Commission opened this rulemaking to implement the provisions of Assembly Bill ("AB") 117, the 2002 legislation that gave local governments the right to establish CCA programs as an

alternative to the utilities for the supply of electricity. In its Phase I decision, D.04-12-046, the Commission addressed a variety of implementation issues. Turning to Phase 2, the Commission addressed many of the remaining issues including: (1) ensuring the necessary cooperation between utilities and CCA programs and (2) utility marketing. With respect to utility cooperation, the Commission emphasized “the particular responsibility” of the utilities under Section 366.2(c)(9) to “cooperate fully with any community choice aggregators that investigate, pursue, or implement community choice aggregation programs.” (Decision, p. 18). The Commission then stated:

The failure of a utility to cooperate in good faith with a CCA could cause the CCA or utility bundled customers to incur unnecessary costs and create unnecessary customer confusion. In our role to regulate the utilities that are the subject of this subsection, if we find that a utility has failed to comply with Section 366.2(c)(9) or relevant Commission orders, we retain authority to impose substantial penalties on the utility and cooperate in any law suit that seeks material damages. Fortunately, at this point, we have no reason to assume that our authority will be required in this regard. (Id.)

This passage is notable in three respects. First, the Commission recognized that a utility’s breach of its duty to cooperate could cause customer confusion and an unnecessary increase in costs to CCA programs and utility customers. Second, the Commission recognized that it could and should have an important role in enforcing the utilities’ duty to cooperate. Third, the last sentence of the quoted passage reflects the absence in the record of any reason to doubt the utilities’ full cooperation with CCA programs. In fact, the utilities’ recognition of the conflicts of interest in utility marketing against CCA programs and their willingness to have the Commission restrict their marketing were positive indications that the utilities would not oppose CCA programs.

With respect to utility marketing, the Decision found that utility marketing to CCA customers could create conflicts of interest and costs that may not be offset by benefits, a finding that closely tracked a proposed finding that PG&E had itself submitted. Finding of Fact 10 states:

Finding of Fact 10. Utility marketing of procurement services to CCA customers and providing information about a CCA’s services and rates to customers may create conflicts of interest and costs that may not be offset by benefits. (Decision, p. 57)

The Commission further noted that it shared “the concerns of TURN and the CCAs that there is little if any benefit from permitting a battle for market share between CCAs and utilities.” (Decision, p. 23). For these reasons and in accord with PG&E’s own recommendation, the *proposed* decision would

have barred utilities from providing information about CCA rates or services or affirmatively contacting customers in efforts to retain them.² However, the text of the final Decision revised the PD to state that, if utilities affirmatively contact customers in an effort to retain them or otherwise actively market utility services, the costs of such marketing should be borne by shareholders, not ratepayers. (Decision, p. 23).³ The Commission offered no explanation for this modification.

B. Utility Positions and Representations in Phase 2

In the hearings leading to the Decision, the utilities represented that they would support CCA. With respect to marketing, the utilities made it clear in their Phase 2 joint testimony that they had no intention to engage in marketing that would disparage CCA programs or would attempt to encourage customers to opt out of CCA service. In fact, the utilities stated in their testimony that they would not object to the Commission “formalizing” this commitment not to actively encourage customers to opt out of the CCA program.⁴ In this same vein, PG&E’s comments on the PD recommended that the Commission enter the following Finding of Fact and Conclusion of Law memorializing the utilities’ commitment and highlighting the problems if utilities were permitted to market to CCA customers:

Finding of Fact 12. The utilities have agreed, on the record of this proceeding, not to affirmatively contact and target CCA customers to encourage them to opt out of the CCA program. *By targeted marketing of procurement services specifically to CCA customers and providing information about a CCA’s services and rates to customers, the utilities may create conflicts of interest and costs that may not be offset by benefits.*

Conclusion of Law 11. The utilities are allowed to continue their normal business activities, communications and advertising with customers *but should be ordered to refrain from marketing their commodity services to CCA customers by actively encouraging customers to opt out of the CCA program.* General communications that the utility may disseminate to its customers at large may be sent to CCA customers.⁵

² Proposed Decision of Administrative Law Judge Malcolm, issued November 2, 2005 (“PD”), p. 23.

³ In conflict with the text, Attachment A of the Decision states that the Commission’s “adopted” position on marketing is that “[u]tilities shall not market their services to CCA Customers.” (Attachment A., p. 1, bottom row). This discrepancy in the Decision is reason alone for the Commission to revisit the issue of utility marketing.

⁴ *Joint Rebuttal Testimony of San Diego Gas & Electric Co., Pacific Gas & Electric Co., and Southern California Edison Co. in Community Choice Aggregation OIR, Phase 2*, dated May 16, 2005, pp. III-8 to III-9, relevant excerpts of which are attached in Appendix B.

⁵ *Comments of PG&E on the Proposed Decision of Administrative Law Judge Malcolm*, dated November 22, 2005, Appendix A, pp. 2, 8-9. The comments are attached to this petition as Appendix C.

Thus, the utilities not only agreed that they should be precluded from engaging in marketing designed to encourage customers to opt out of CCA service, but also identified the problems of utility conflict of interest and increased costs if such marketing were permitted.

PG&E, in fact, went beyond neutrality and expressed its affirmative support for CCA.

Specifically responding to claims that utilities were seeking “to impair CCA,” PG&E responded:

*PG&E has stated before and states again that CCA is a consumer choice alternative that should be enabled, provided remaining bundled customers’ interests are not harmed as a result.*⁶

Thus, at the time the Commission issued the Decision, PG&E represented that it was an enthusiastic supporter of CCA as a “consumer choice alternative.”

C. PG&E’s Reversal of Position Regarding CCA Programs

In a complete turnaround, PG&E’s corporate position now is to oppose CCA programs, including actively discouraging local governments from establishing such programs, offering additional funding for other programs in exchange for local governments not participating in CCA, and encouraging customers to opt out of CCA service. Additionally, PG&E is also the primary financial backer of a proposed California ballot measure that would amend the State Constitution to, among other things, require a two-thirds majority of voters to approve the implementation of a CCA program. The effect of this PG&E-supported amendment would be to re-write AB 117, and impede local governments from forming CCA programs through their ordinary processes for adopting ordinances.⁷

In a 2008 settlement with San Joaquin Valley Power Authority, PG&E expressly acknowledged that it had “change[d] its position on CCA” from the position it took in Phase 2.⁸ PG&E admitted that it had abandoned its “original position of neutrality”⁹ toward CCA programs and that its revised position “includes marketing its energy supply services to retain customers.”¹⁰ This

⁶ *Id.*, p. 2 (emphasis added).

⁷ Section 366.2(c)(10)

⁸ D. 08-06-016, Appendix A (Settlement Agreement in *San Joaquin Valley Power Authority v. PG&E*), Section 4.2.

⁹ In calling its original position one of neutrality, PG&E was clearly engaging in revisionist history. As shown above, the record in this docket showed that PG&E affirmatively supported CCA.

¹⁰ *Id.*, Section 4.1.

contradicts its Phase 2 position to refrain from marketing to dissuade customers from taking service from a CCA provider. This admission before the CPUC conclusively demonstrates that one of the Commission's key assumptions underlying the Decision – that the utilities would not actively oppose CCA programs – is no longer true. PG&E has acted upon its new-found opposition to CCA programs in a variety of ways, some of which are summarized below.

Presentations to City Councils to Discourage CCA Membership.

In October 2009, PG&E made presentations to member cities of the Marin Energy Authority (“MEA”) with the evident purpose of attempting to convince various city councils to back out of the CCA program that MEA is in the process of implementing. In written slides accompanying the presentations, PG&E levels a variety of accusations at the MEA program, even though MEA had not at that time finalized a contract with an electricity supplier and had not yet determined the rates, terms and conditions of service for customers. For example, in a presentation to the city of Mill Valley, PG&E charges, among other things, that the MEA plan contains “hidden costs,” “hidden greenhouse gas compliance costs,” “hidden joint and several liability” and a “hidden tax on Marin taxpayers.”¹¹ The slide regarding joint and several liability is particularly telling. It purports to interpret a variety of MEA documents and raise concerns about the member cities’ potential financial obligations. The MEA member cities have their own lawyers and can interpret such documents on their own; yet, consistent with its new-found opposition to CCA programs, PG&E presented its own inflammatory spin on those documents.

Linkage Between A City's Receipt of Public Purpose Funds and Non-participation in CCA.

PG&E has been encouraging communities to stay out of CCA programs by linking a community's receipt of PG&E-administered public purpose program benefits to the community's decision not to participate in CCA. For example, in a June 30, 2009 letter to the City Manager of Novato, PG&E details a “proposed Collaboration” between PG&E and Novato under which PG&E would take advantage of its role as administrator of energy efficiency and California Solar Initiative

¹¹ See PG&E slide presentations to the City of Mill Valley dated 10/19/09 and to the Town of Tiburon dated 10/21/09, attached as Appendix D to this Petition. The slides indicate that three high-level PG&E representatives were present at the meetings: Joe Nation (former member of the State Assembly), David Ruben (a PG&E director), and Chris Warner (a PG&E senior attorney).

programs to provide significant benefits to Novato. The next to last paragraph of the letter (p. 16) states:

We believe that our Collaboration Proposal provides a pathway for Novato to meet its climate change objectives faster, cheaper and with better results *without exposing itself, the City, our customers and taxpayers to the uncertainty and risk of a Community Choice Aggregation scheme.*¹²

This sentence clearly implies that the offer is contingent on the city's decision not to pursue a CCA program.¹³

Soliciting Opt-Outs Before the Formal Notification Period.

PG&E has shown its eagerness to get prospective CCA customers to opt out by offering a toll-free PG&E telephone number for customers to call even before the beginning of the statutory notification period pursuant to Section 366.2(c)(11) – during which CCA programs explain their terms and conditions and the customers' opt-out rights.¹⁴ In draft Resolution E-4250, the Commission's Energy Division has proposed to order PG&E to cease this practice.¹⁵ However, as shown below, allowing utilities to solicit opt-outs at any time (unless invited to do so by the CCA provider) conflicts with Section 366.2(c) and should be prohibited.

Support for a Ballot Measure to Make It Significantly More Difficult to Implement CCA Programs.

In recent months, PG&E escalated its new-found opposition to CCA programs to a new level. PG&E is supporting and bankrolling a proposed initiative amendment to the California Constitution with the avowed purpose of requiring a two-thirds vote before a local government could implement a

¹² Letter from Joshua Townsend, PG&E to Michael Frank, City Manager of Novato, dated June 30, 2009, p. 16 (emphasis added). The document is attached as Appendix E.

¹³ Draft Resolution E-4250 correctly recognizes that conditioning the receipt of benefits on a local government's decision not to pursue CCA is improper and should be prohibited.

¹⁴ As of the date of filing this Petition, PG&E's Community Choice Aggregation web page states that customers may opt out of "CCA in your community" either "now" or "during the CCA program's formal notification process." As recently as November 24, 2009, PG&E's web site included the toll-free number to opt out, even though no CCA program in California had yet begun the statutory notification process. Likely in response to the proposed Energy Division Resolution, PG&E has since deleted reference to the toll-free number and stated that it can only help with opt-outs after the notification period has begun. See print-outs of PG&E's webpages at Appendix F.

¹⁵ This Draft Resolution first appeared on the Commission's September 10, 2009 agenda. A revised Draft Resolution was circulated for comment on December 22, 2009, and the item now appears on the January 21, 2010 agenda.

CCA program or use public funds or financing, including revenues from rates, to start or expand electric delivery service.¹⁶ With respect to CCA programs, the effect of this amendment would be to re-write AB 117, which allows local governments to form CCA programs through their ordinary processes for adopting ordinances.¹⁷ The two-thirds vote requirements would impose a new barrier that would, at a minimum, dramatically increase the costs of forming CCA programs. PG&E has thus far contributed over \$5 million to the campaign for this initiative¹⁸ and has publicly supported it.¹⁹ PG&E considers the initiative a high corporate priority and included a discussion of the initiative in earnings calls with financial analysts. In such an October 29, 2009 conference call, PG&E's President, Chris Johns, stated that the company was "actively involved" in the initiative and explained PG&E's hope that the initiative, if successful, would significantly reduce the need for utilities to expend significant resources to "oppose . . . local government takeover attempts."²⁰ Later in that same call, PG&E Corporation's Chairman, Peter Darbee, stated in relation to the initiative: "We clearly [have] taken a position that we value of [*sic*] our customers very much and we are going to stand up and resist efforts to take over our customers, and those efforts by municipal government."²¹

Marketing Against San Francisco's CCA Program.

PG&E has recently begun to target its anti-CCA efforts on San Francisco's program. In December 2009, a six-page color brochure was delivered to San Francisco business addresses with a huge, foreboding front-page headline reading "BUSINESS BEWARE". The brochure states that it was prepared by a coalition, the only identified member of which is PG&E.²² The brochure makes

¹⁶ See Section 2 of "The Taxpayers Right to Vote Act" in Appendix G to this Petition.

¹⁷ Section 366.2(c)(10).

¹⁸ See ElectionTrack report of PG&E's contributions to the initiative at <http://www.electiontrack.com/lookup.php?committee=1318623>, a printed copy of which can be found in Appendix H to this Petition.

¹⁹ See "PG&E backs measure to tighten grip on cities," *San Francisco Chronicle*, August 18, 2009, in Appendix I to this Petition.

²⁰ See *PG&E Corporation Q3 2009 Earnings Call Transcript*, p. 3, <http://seekingalpha.com/article/169928-pg-amp-e-corporation-q3-2009-earnings-call-transcript>, a printed copy of which can be found in Appendix J to this Petition.

²¹ *Id.*, p. 5.

²² A copy of the brochure is attached to this petition as Appendix K. The brochure states that it is the "business edition" suggesting that a "residential edition" may already exist or will soon be forthcoming.

clear PG&E's opposition not just to San Francisco's efforts, but to the CCA law in general. The mailer ominously warns "DON'T BE LEFT IN THE DARK" and describes CCA as a "risky scheme" that was "[c]reated by Sacramento legislation" that "automatically enrolls you – *whether you like it or not* – unless you opt out." The mailer leaves no doubt that PG&E's intent is to prevent CCA from coming to fruition in San Francisco:

In 2008, our Common Sense Coalition organized more than 50,000 San Franciscans to defeat Proposition H. Now we are standing up for our residential and business customers against yet another costly and unnecessary energy scheme: San Francisco's Community Choice Aggregation Program.

PG&E's goal "to defeat" CCA in San Francisco is underscored by the Q&A, "How can I stop CCA?" In addition, the brochure refers readers to a website which presents much the same text as the brochure, using the same colors and graphics.²³ The website is clearly geared toward both residential and business customers, replacing the business brochure's business-oriented headline with the generic, but equally foreboding: "BUYER BEWARE."

The foregoing demonstrates that, contrary to PG&E's position of support toward CCA programs in Phase 2 of this docket, PG&E now strongly opposes CCA programs and has been acting accordingly, including lobbying local governments aggressively to resist efforts at forming CCA programs, soliciting customer opt-outs even before CCA programs have begun offering service, and broad-based marketing designed to prevent the success of CCA programs. With its support of the two-thirds vote constitutional amendment, PG&E has now made clear that opposing CCAs is a significant corporate priority to which the company is willing to devote substantial financial resources and the time and energy of its highest corporate officers.

D. Status of San Francisco's CCA Program

CCSF formally began implementation of its CCA program in 2004.²⁴ CCSF took a significant step on November 5, 2009 with the issuance of a request for proposals ("RFP") for electricity supply services. CCSF received responses to its RFP on December 29, 2009 and is now reviewing and

²³ <http://www.commonssensesf.com/>

²⁴ See CCSF Ordinance No. 86-04, approved May 27, 2004. See also Ordinance No. 146-07, approved June 6, 2007, and Ordinance 147-07, approved June 12, 2007. These documents are attached as Appendix L.

evaluating the responses. Among other tasks, CCSF is now focused on negotiating and awarding one or more contracts for supply services and preparing an implementation plan for presentation to the Commission pursuant to Section 366.2(c)(3).

III. REQUESTED MODIFICATIONS

A. Need for Modifications

Given the reality that the State's largest utility is now opposing CCA, the Commission must revisit its determinations in the Decision regarding utility marketing and the manner in which the Commission enforces the utility's duty to cooperate. If left unchecked by the Commission, the utilities will continue to engage in full-blown marketing offensives against CCA programs – including media, Internet, direct mail and face-to-face campaigns – that disparage CCA programs and encourage customers, large and small, to opt out of the CCA service. Such marketing exploits the utilities' monopoly-conferred advantage with consumers and is contrary to the Commission's longstanding efforts to prevent such anticompetitive leveraging of monopoly advantages in markets where the Legislature has provided for competition. In addition, as the Commission envisioned in 2005, utility marketing will confuse customers who will question whether their distribution, billing and other services from the utility will suffer if they take service from a CCA program that the utility actively opposes and depicts as risky. Furthermore, as the Commission recognized and the utilities themselves conceded in 2005, utility marketing will create obvious conflicts of interest for the utilities and their employees, who are supposed to be "fully cooperating" with CCA programs while their company is actively and publicly attempting to prevent the program from succeeding.

More generally, in light of PG&E's concerted efforts to undermine CCA, the Commission must make clear that any utility conduct designed to impede or frustrate CCA programs violates the rights of local governments to form CCA programs free of utility interference and the utilities' duty of full cooperation.

The Decision expressly reflects an assumption that, at that time, the Commission had no reason to be concerned with utilities breaching their statutory duty to cooperate with CCA programs. Such an assumption may have been warranted in 2005 based on the utilities' professed non-opposition to CCA programs and their willingness to abide by a bar from marketing or encouraging customer opt-outs.

However, four years later, PG&E's statements and actions show that the Commission needs to revisit key determinations in the Decision.

B. Summary of Requested Modifications

To fulfill its duty to uphold and implement AB 117, the Commission must modify the Decision in several respects.²⁵ First, the Commission should adopt the recommendation in the original PD and prohibit the utilities or their agents from marketing to retail customers regarding a CCA program or programs. Marketing, as defined in Appendix A to this petition, includes materials that discuss the rates or services of a CCA program, have the purpose or effect of discouraging customers from taking service from a CCA program, or have the purpose or effect of encouraging or facilitating the utility's retention of customers.²⁶ As exceptions to the general rule barring marketing, the proposed modification would: (1) allow utilities to respond to customer questions about the utilities' (but not the CCAs') rates and services and the process by which customers would be transferred to CCA service and (2) allow communications that are specifically required by the Commission. Furthermore, to avoid any potential conflict with the First Amendment, the proposed rule would not apply to utility communications specifically made to a governmental entity or official so long as those communications are not deceptive, misleading or untruthful.²⁷

Second, to prevent utilities from using other, non-marketing means to achieve the improper objective of thwarting CCA programs, the Commission should prohibit the utilities from engaging in any conduct that is designed to impede or frustrate the investigation, pursuit, or implementation of a CCA program or programs. As a limited exception, this rule should not apply to conduct that a utility conclusively demonstrates is protected by the United States or California Constitution.

²⁵ The details and the specific language of the requested changes are set forth in Appendix A.

²⁶ Under this definition, general utility "image advertising" that is broadly disseminated throughout a utility's service territory would not be proscribed. However, if such advertising were, for instance, targeted to areas that are investigating, pursuing, or implementing CCA programs pursuant to Section 366.2(c)(9) and had the purpose or effect of discouraging CCA enrollment or encouraging potential CCA customers to stay with the utility, it would be prohibited.

²⁷ Under the proposed rule in Appendix A, if the utility were also to disseminate to retail customers the content of its communication to the government, such dissemination would constitute illegal marketing.

Third, the Decision should be modified to prohibit utilities from soliciting opt-out requests from consumers at any time or from dictating the opt-out mechanism, except when specifically requested to do so by a CCA program. The detailed, carefully balanced provisions of AB 117 give CCA programs, not the utilities, the responsibility for soliciting opt-outs and determining the opt-out mechanism. The Commission should make clear that the utilities may not undertake such activities unless specifically invited to do so by the CCA provider.

Fourth, the Commission should clarify what is already implicit in the Decision – that CCA programs may file a complaint with the Commission to redress deceptive, misleading, or untruthful communications by a utility. The Commission should do so by explicitly prohibiting utilities from making deceptive, misleading or untruthful statements to any person regarding a CCA programs or programs.

Fifth, to supplement and amplify the Commission’s statements in the Decision that it will vigorously enforce any violations of the utilities’ duty to cooperate, the Decision should be modified to make explicit that, upon a proper showing, a CCA program filing a complaint against a utility will be able to obtain temporary or preliminary injunctive relief from the presiding officer pending confirmation of such an order by the full Commission. Without a speedy and effective remedy for utility violations, a CCA program could be irreparably harmed by improper utility behavior.

CCSF requests that, to the extent that any utility tariffs conflict with the modifications ordered in response to this petition, the Commission should order the utilities to file corrected tariffs immediately.

Finally, CCSF requests expedited consideration for this petition. CCSF’s CCA program is at a critical stage, with important decisions being made in the coming weeks. With its December 2009 mailer and website attacking San Francisco’s program, PG&E has already begun what PG&E hopes will be an extensive and successful campaign to thwart the City’s goal of giving consumers a green alternative to PG&E power. The Commission bears the important responsibility of effectuating and upholding California’s CCA law and should give this petition its highest priority.²⁸

²⁸ Nothing in this petition should stop the Commission from adopting the Energy Division’s draft Resolution E-4250 (“Draft Resolution”), which at the time of filing this petition is still pending before the Commission. The Draft Resolution would implement some important, but much more

IV. THE DECISION SHOULD BE MODIFIED TO BAR UTILITIES FROM MARKETING TO RETAIL CUSTOMERS RELATED TO CCA PROGRAMS

PG&E's change in position requires the Commission to consider issues it did not need to think about based on the Phase 2 record. Contrary to the utilities' Phase 2 position, PG&E has clearly decided that, regardless of the rates, terms and conditions of a particular CCA program, PG&E will oppose that program and take whatever steps it deems appropriate to prevent local governments from "taking" "its" customers. This position is at odds with AB 117 in two ways. First, the CCA law grants local governments a right to establish a CCA program in accordance with the provisions of Section 366.2. PG&E is blatantly attempting to interfere with this right. Second, PG&E's efforts to oppose CCA violate the utilities' express duty under Section 366.2(c)(9) to cooperate fully with any CCA programs.

One key means by which PG&E will pursue its opposition to CCA programs is marketing. Contrary to its representations in the Phase 2 record, PG&E has shown that it will aggressively attempt to encourage customer opt-outs through marketing that disparages CCA programs and promotes PG&E's reputation and services. The Commission must bar such marketing in order to serve the following important State interests: (1) full utility cooperation with CCA programs and the avoidance of utility conflicts of interest; (2) avoidance of anti-competitive leveraging of the utilities' monopoly advantages; and (3) avoidance of customer confusion. As will be shown below, the requested marketing prohibition is a reasonably tailored means to achieve these requirements.

A. The Requested Modification Is Necessary In Order to Serve Important State Goals

1. Full Utility Cooperation With CCA Programs

Community choice aggregation simply will not work without the cooperation of the utilities. Among other services that utilities must continue to provide under CCA, utilities must deliver electricity to customers over transmission and distribution facilities and are responsible for billing

limited, changes to utility practices regarding CCA programs. CCSF urges the Commission to adopt the revised Draft Resolution with the changes recommended by the City in its January 11, 2009 comments and quickly move ahead with the broader, and equally necessary, additional changes requested in this petition.

customers for the utilities' own delivery services and for the electricity that is supplied by the CCA program. The requirement in Section 366.2(c)(9) that all utilities "shall cooperate fully with any community choice aggregators that investigate, pursue or implement community choice aggregation programs," is thus central to the successful implementation of AB 117. The Legislature phrased this duty broadly, using the word "fully" to moderate "cooperate," and specifically requiring such full cooperation through all phases of the development of a CCA program, including the investigation, pursuit and implementation stages.

As both the Commission (in FOF 10 in the Decision) and the utilities themselves recognized in Phase 2 of this docket, utility marketing intended to undermine the success of CCA programs poses an inherent conflict with the duty of full cooperation. A utility decision to engage in such marketing sends a clear message to utility employees, retail customers, and CCA programs that the utility wants to prevent the success of the CCA effort. A utility with such a corporate policy, as expressed and evidenced through anti-CCA marketing, simply cannot be viewed as fully cooperating with CCA programs. Moreover, utility employees who interact with CCA programs are placed in the untenable position of serving two different masters—the statutory duty of full cooperation and the corporate goal of defeating CCA programs. Within PG&E, where the Chairman has publicly stated, "we are going to stand up and resist efforts to take over our customers," employees that cooperate with CCA programs likely cannot help but feel that they are working contrary to the company's avowed mission.

The Commission has authority to fashion rules, such as a ban on utility marketing, to ensure that utilities comply with their duty of full cooperation. The Commission also has general power under Section 701 to "do all things" necessary to serve the State's goals in the regulation of public utilities. In addition, Section 366.2(c)(9) specifically charges the Commission with determining the "terms and conditions" under which utilities shall provide services to CCA programs and retail customers. Thus, the Commission can and should give effect to the duty to cooperate by barring utilities from marketing to defeat CCA programs.

2. Mitigation of Utility Monopoly Advantages

In the past few decades, as policy-makers have introduced competition for services that have traditionally been provided by monopoly utilities, the Commission has placed a high priority on

preventing the utilities from leveraging their monopoly advantages in newly competitive segments of the market. The Commission has recognized “the obvious advantage of the incumbent utility as we move toward increasing competition” and the “clear need” for rules to promote a level playing field.”²⁹ The obvious advantages identified by the Commission include the utilities’ “name brand recognition”³⁰ (including use of the utilities’ logo),³¹ opportunity to use the utility billing envelope to market competitive products,³² and use of the utility’s reputation and customer contacts in joint marketing of monopoly and competitive products.³³

The Legislature and Commission have viewed these advantages as so detrimental to fair competition that they have taken extraordinary measures to restrain the ability of utilities to leverage their market power. In 1996, to accommodate direct access transactions, the Legislature required a separation of utility transmission and distribution functions, on the one hand, and electric procurement and supply functions on the other, so that utilities that wished to offer competitive electricity supply services could only do so through separate and independent affiliates.³⁴ In the *Affiliate Transactions Rules Order*, the Commission established detailed rules to prevent utilities from leveraging their market power, including a ban on joint marketing of utility and affiliate competitive services and a prohibition on use of the utility bills to market an affiliate’s competitive services unless the utility makes the billing envelope available to all competitors.³⁵

Utility exploitation of market power poses the same challenge to the success of CCA programs that it did in the context of direct access. Left unrestricted, utilities are free to use their monopoly-derived revenues, reputations and brand name recognition to promote their competing electricity supply services and to disparage CCA services. In addition, utilities are able to exploit their numerous

²⁹ *Opinion Adopting Standards of Conduct Governing Relationships Between Utilities and their Affiliates (“Affiliate Transactions Rules Order”)*, D. 97-12-088, 1997 Cal. PUC LEXIS 1139, *15.

³⁰ *Id.*, *16.

³¹ *Id.*, *75 - *85.

³² *Id.*, *94.

³³ *Id.*, *85-*95.

³⁴ *See* Section 330(k).

³⁵ *Id.*, Appendix A, especially Section V.F.

contacts with their customers to engage in marketing to retain customers. For their largest customers, utilities can capitalize upon the personal marketing relationships they have developed over the years; for their smaller customers, the utilities can transform every bill and every other customer communication with the utility – e.g., billing questions, energy efficiency advice, maintenance requests – into a marketing opportunity. All of these advantages enable utilities to derive enormous bang for the buck from their marketing efforts; CCA programs, enjoying none of these inherent advantages, will be forced to incur significant costs to have any hope of counteracting such marketing. Undoubtedly for this reason, the Commission recognized in the Decision that there would be “little if any benefit from a battle for market share between CCAs and utilities” (Decision, p. 23) and that utility marketing could create “costs that may not be offset by benefits.”

Banning utility marketing against CCA programs will partially level the playing field by limiting the opportunities for utilities to leverage their reputation, brand name recognition, and established marketing channels to defeat CCA programs. As discussed below in Section III.B, a ban on marketing is far less intrusive and far more practical than other more drastic alternatives as a first step in attempting to mitigate utility market power.

3. Mitigation of Customer Confusion

As previously noted, CCA requires full cooperation of the utility with CCA programs in many ways, including providing distribution and billing services to CCA customers. When a utility is actively opposing and demonstrating its hostility to a CCA program, customers are sure to wonder whether they can expect the same quality of overall service if they take service from a CCA provider. For example, customers may wonder whether utilities will be as responsive to requests from CCA customers as from bundled utility customers, or whether a utility that is hostile to the CCA provider and vigorously opposed the CCA program will take longer to restore service to CCA customers after an outage. Utilities that disparage a CCA program will likely lead some customers to question whether it is wise to obtain an essential service through an arrangement that requires the cooperation of an obviously unwilling partner. Indeed, utilities will have a strong incentive to foment such doubt and confusion, because customers who fear such problems are more likely to stay with the utility.

PG&E has already demonstrated that its marketing will aim to sow fear, doubts and confusion rather than providing useful, factual information to customers. The December 2009 mailer and website attacking CCSF's program appeal to fear by warning customers to "BEWARE" and not be left "IN THE DARK". In addition, those San Francisco marketing materials cherry-pick isolated statements from a two-year old CCSF report about potential CCA prices to tar the City's CCA program, even though the same report indicated that CCA offered many potential benefits to San Franciscans and, more importantly, even though no useful factual information about actual CCA prices will be available until the CCA program sets the actual rates and terms of service. PG&E's tactics are consistent with its goal of blocking CCA efforts, regardless of the factual merits of a particular CCA plan. Countering marketing that only needs to sow confusion and doubt to be successful will be extremely costly for CCA programs, particularly when the marketing occurs even before the program has a service with specified prices, terms and conditions to offer.

Barring utilities from engaging in anti-CCA marketing will serve the Commission's important goal of mitigating customer confusion. As part of the Commission's efforts to promote competition, the Commission has stated its "serious concern" about customer confusion and emphasized the Commission's "significant interest" in preventing such confusion.³⁶ Without confusion-creating utility marketing, retail customers will be better able to make an informed, fact-based decision and CCA programs will be spared the potentially high costs of countering such unenlightening marketing.

In sum, utility marketing conflicts with three extremely important State interests: (1) ensuring the full utility cooperation required by AB 117, (2) preventing the exploitation of utility market power, and (3) preventing customer confusion. Without a marketing prohibition, the utilities will thwart the legislative goal of promoting a viable CCA alternative to utility procurement service.

B. The Requested Modification is a Reasonable Means of Protecting These Important State Goals

The foregoing has shown that, in the face of active utility opposition to CCA, unrestricted utility marketing will undermine important State interests and thwart CCA programs. This section will

³⁶ *Opinion Denying Rehearing of Decision 97-12-088 ("Affiliate Transactions Rehearing Decision")*, D. 98-12-089, 1997 Cal. PUC LEXIS 917, Section II.5(b)(i).

show that the proposed prohibition on utility marketing is a reasonable initial means of protecting these State interests and that other potential remedies are too limited to be effective. If these measures prove insufficient to prevent utilities from undermining the success of CCA programs, more extensive, complex measures such as functional separation may become necessary.

1. The Proposed Ban on Utility Marketing Is Similar to the Rule in the Phase 2 Proposed Decision, Which Itself Was Similar to a Utility Proposal.

Evidence of the reasonableness of the ban on utility marketing proposed in this Petition is supplied by the fact that the Phase 2 PD would have included a similar ban on utility marketing, even based on a record in which the utilities had affirmed their neutrality to CCA programs. Conclusion of Law (COL)12 in the PD stated:

12. Utilities should be ordered to refrain from marketing their services to CCA customers and may not characterize a CCA's services or rates to customers except with the explicit authority of the CCA.³⁷

The PD's proposed marketing ban, in turn, was grounded in a proposal from the utilities themselves. As previously noted, in their Phase 2 testimony, the utilities stated that the Commission should formalize in its decision their commitment not to encourage customers to opt out of the CCA program.³⁸ PG&E had only minor concerns with the PD's COL 12 and requested language that still would require the utilities to "refrain from marketing their commodity services to CCA customers by actively encouraging customers to opt out of the CCA program."³⁹ Thus, even PG&E recognized the conflict that utility marketing posed to the viability of the CCA legislation and the need for strong restrictions on such marketing.

Like the PD, the proposed modification set forth in Appendix A to this Petition prohibits both utility promotion of its own rates and services and utility discussion of the CCA program's rates and services. In addition, like the PD, the proposed modifications recognize the reality that utilities will passively receive requests from customers about their rates or services and how the process of transfer

³⁷ PD, p. 61.

³⁸ *Joint Rebuttal Testimony of San Diego Gas & Electric Co., Pacific Gas & Electric Co., and Southern California Edison Co. in Community Choice Aggregation OIR, Phase 2*, dated May 16, 2005, pp. III-8 to III-9, relevant excerpts of which are attached in Appendix B.

³⁹ *Comments of PG&E on the Proposed Decision of Administrative Law Judge Malcolm*, dated November 22, 2005, Appendix A (FOF 11), which is attached as Appendix C.

to a CCA program would work. Like the PD, this Petition proposes a limited exception that would allow utilities to respond to provide factual responses to such inbound requests, as long as the utilities do not stray into marketing pitches in the course of their responses.⁴⁰

2. The Decision's Ban on Using Ratepayer Funds to Support Utility Marketing, While Useful, Is Ineffective to Serve the State's Important Interests.

Rather than prohibiting utility marketing, the Decision opted for a more limited approach – barring the use of ratepayer money to pay for utility marketing. While this rule has some theoretical value in avoiding ratepayer support for such efforts, as a practical matter, it is ineffective at serving the State's important goals related to CCA.

The effect of the rule is only to prevent utilities from including the costs of CCA marketing in their general rate case (“GRC”) revenue requirement requests. Once a revenue requirement is determined in the GRC decision, nothing prevents a utility from using its revenues on CCA marketing, as long as the utility can meet its other obligations. In addition, enforcement of the rule is itself a challenge.

Even assuming there is a clear wall between ratepayer and shareholder money and utilities are only permitted to use the latter, the rule is still ineffective in the face of concerted utility opposition to CCA programs. PG&E has already spent \$5 million on the two-thirds vote ballot measure, and the media campaign in support of the initiative has not even begun. As PG&E's highest-level officers have explained to Wall Street analysts, PG&E considers money to stop municipal efforts to “take” “its” customers to be money well spent. Accordingly, the rule barring the use of ratepayer money for CCA marketing will not stop such marketing and therefore will not avoid the inherent conflict with the utilities' duty of full cooperation, will not prevent utility leveraging of its monopoly advantages, and will not prevent the customer confusion that will result from such marketing.

3. The Limited Measures Adopted in the Settlement Agreement Between SJVPA and PG&E are Inadequate

Another potential approach to protect the State's interests with respect to CCA is to adopt measures similar to those agreed to in D.08-06-16, which approved a settlement between San Joaquin

⁴⁰ See PD, p. 23.

Valley Power Authority (“SJVPA”) and PG&E related to marketing issues. That settlement, applicable only to the relationship between SJVPA and PG&E, created a “functionally separate” group of PG&E employees who are primarily responsible for CCA marketing.⁴¹ This approach has key shortcomings.

First, it does nothing to address the conflict with the utility’s duty of full cooperation with CCA programs. Under the settlement, PG&E is still free to aggressively market against SJVPA’s CCA program, including disparaging marketing. Moreover, the “functionally separate” group and the rest of PG&E employees all still report to the same PG&E management that is committed to preventing the success of any CCA program. Consequently, the utility and its employees still face the unreconciled conflict of having a legal duty to cooperate fully with a CCA program that the utility is very publicly attempting in the marketplace to discredit and thwart.

Second, such functional separation does nothing to mitigate the utilities’ ability to leverage their monopoly advantages. Utilities are still free to capitalize upon the reputations and brand name recognition they enjoy solely because of their longstanding monopolies.

Third, the functional separation in the SJVPA settlement does nothing to limit the utilities’ ability to foment customer confusion and anxiety about CCA. As previously noted, when utilities are free to discredit a CCA program, at least some customers are sure to wonder whether it would be wise to switch from bundled service to an arrangement that depends on seamless cooperation between the utility and the CCA provider.

4. Potential Alternative Measures to Protect the State’s Interest Would Be Far More Extensive

While the previous section has shown that limited functional separation would not address the significant problems caused by full-fledged utility opposition to CCA programs, a more effective solution would be full structural separation. As the Commission well knows, “structural separation” is a shorthand phrase for the complex process of requiring the utility to create a wholly independent subsidiary to market and sell the newly competitive product (in this case procurement services) and fashioning affiliate transactions rules to prevent the new subsidiary from benefiting from the market

⁴¹ D.08-06-016, Appendix A, Article 7, pp. 7-8.

power of the monopoly utility. This approach was followed for the restructuring of both the electric and telecommunications industries that began in the mid-1990s.⁴²

To be effective, structural separation would require the utilities to create separate and independent legal entities to provide and market procurement services for those geographic areas in which local governments are implementing CCA programs. To fully address the inherent conflicts of interest that PG&E now faces, the procurement activities of the separate affiliate would need to be wholly independent from the utility, so that the utility would be neutral as between partnering with its affiliate and a CCA program. In addition, structural separation requires detailed affiliate transactions rules that would take considerable time to formulate. These are complex and sweeping changes that would require significant time and resources to implement and would impose significant restructuring requirements on the utilities. If the commission wants to pursue such a structural separation, it should adopt the modifications proposed here in the meantime.

C. The Proposed Marketing Prohibition Is Consistent with the First Amendment

The proposed prohibition on utility marketing related to CCA programs is fully consistent with the First Amendment. As will be discussed below, the Commission has already found, in the *Affiliate Transactions Rehearing Decision*, that a nearly identical prohibition on utility marketing satisfied all applicable constitutional requirements.

Speech that proposes a commercial transaction, such as the marketing at issue here, is commercial speech, which enjoys a limited measure of First Amendment protection compared to other forms of constitutionally protected expression.⁴³ A prohibition on commercial speech will be upheld if the prohibition directly advances a substantial governmental interest⁴⁴ and is a reasonable fit with such

⁴² For the electric industry, *see generally* D. 97-05-040 (fashioning rules to facilitate direct access transactions) and the *Affiliate Transactions Rules Order*, setting forth detailed rules which address, among other things, requirements regarding nondiscrimination, disclosure and information, and separation between the utility and affiliate. For the telecommunications industry, *see, e.g.*, 47 U.S.C. Section 272, which details, among other things, separate affiliate requirements, structural and transactional requirements, nondiscrimination safeguards, and audit requirements.

⁴³ *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 473-474, 477 (1989)

⁴⁴ *Id.*, 492 U.S. at 475, citing *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980).

governmental interest. A “reasonable fit” is one that “is not necessarily perfect” and that “represents not necessarily the single best disposition but one whose scope is ‘in proportion to the interest served.’”⁴⁵

The proposed prohibition on CCA marketing clearly constitutes commercial speech. The marketing to be regulated proposes a commercial transaction in that it seeks to convince retail customers to use the utilities’ electricity procurement services and not those of a competing CCA provider. The proposed modification specifically excludes truthful and accurate communications made to a government body or government official, which arguably could in some instances constitute political speech that is entitled to higher First Amendment protection.⁴⁶

The proposal easily satisfies the constitutional requirements for commercial speech. As previously shown, the proposed marketing prohibition directly advances substantial State interests: ensuring full utility cooperation with CCA programs, a requirement of State law; avoiding anti-competitive leveraging of utility market power; and avoiding customer confusion regarding CCA programs. The Commission has recognized that preventing utilities from exploiting their monopoly advantages and avoiding customer confusion in newly competitive markets are substantial interests that justify significant restrictions on commercial speech by utilities.⁴⁷ In addition, the proposed prohibition satisfies the “reasonable fit” requirement because, as shown in the previous Section, it is reasonably tailored to be an effective means of serving the State interests while avoiding more extensive restrictions unless and until they are proven to be necessary.

In the *Affiliate Transactions Rehearing Decision*, the Commission upheld a nearly identical ban on utility marketing – designed to serve many of the same purposes as the rule proposed here – against a First Amendment challenge. One of the affiliate rules under attack in that order (Rule V.F),

⁴⁵ *Id.*, 492 U.S. at 480, citing *In Re R.M.J.*, 455 U.S. 191, 203 (1989).

⁴⁶ In making this statement, CCSF does not concede that a restriction or prohibition on political speech related to CCA would violate the utilities’ First Amendment rights.

⁴⁷ *Affiliate Transactions Rehearing Decision*, D. 98-12-089, Section II.5(b)(i). In that decision, the Commission cited the U.S. Supreme Court’s recognition of “the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association.” *Id.*, Section II.5, fn. 9, citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982)

prohibited utilities from marketing any competitive services offered by affiliates, including electricity procurement services. The Commission held that the prohibited marketing was commercial speech, that the prohibition directly served substantial state interests – including the prevention of utility leveraging of their monopoly advantages and the avoidance of customer confusion – and that the rule was a reasonable means of advancing the Commission’s goals.⁴⁸ Thus, the Commission has already thoroughly addressed the First Amendment issues raised by the proposed prohibition on utility marketing and found that such a prohibition fully comports with constitutional requirements.

V. THE DECISION SHOULD BE MODIFIED TO BAR UTILITIES FROM ENGAGING IN CONDUCT DESIGNED TO THWART CCA PROGRAMS, EXCEPT WHEN SUCH CONDUCT IS EXPRESSLY PROTECTED BY THE CONSTITUTION

Thus far, this petition has focused on the most obvious means by which utilities will attempt to thwart CCA programs – marketing. However, a utility as determined as PG&E to prevent the success of CCA can be expected to use means other than marketing to impede CCA implementation. Any efforts by a utility to undermine CCA are antithetical to the Legislature’s intent to enable local governments to offer consumers a CCA option and to the utilities’ express and specific duty under Section 366.2(c)(9) to fully cooperate with the investigation, pursuit or implementation of CCA programs. Accordingly, the Commission should prohibit any conduct by utilities that frustrates or impedes the investigation, pursuit or implementation of a CCA program or programs. Put simply, such conduct would violate California CCA law and should not be allowed.

CCSF suggests a limited exception to this proposed modification. If a utility can conclusively demonstrate that prohibition of particular conduct would violate the rights of the utility under the United States or California Constitution, such conduct should not be prohibited. The purpose of this exception is to enable the Commission to avoid constitutional error. However, to prevent the utilities from exploiting this exception to neuter the general rule, the Commission should only apply this exception if there is a clear demonstration that the conduct in question is constitutionally immune from government restriction.

⁴⁸ *Id.*, Section II.5.

VI. THE DECISION SHOULD BE MODIFIED TO BAR UTILITIES FROM SOLICITING OPT-OUT REQUESTS OR DICTATING THE OPT-OUT MECHANISM, EXCEPT WHEN REQUESTED TO DO SO BY A CCA PROGRAM

In the careful balance struck in AB 117, the Legislature made a conscious choice to automatically enroll customers in a CCA program unless the customer affirmatively opts out of CCA service. As part of this careful balance, the Legislature crafted detailed provisions regarding how customers are to be notified of the opt-out opportunity and how customers may indicate their desire to opt out. AB 117 contemplates that CCA programs, not utilities, should be responsible for offering customers an opportunity to opt out of CCA service as part of the customer notification process required by Section 366.2(c)(11) and (13). Similarly, Section 366.2(c)(13) makes the CCA programs, not the utilities, responsible for specifying the mechanism by which customers may indicate an opt-out preference. As explained below, utility practice and tariffs are inconsistent with the process carefully prescribed by the Legislature. To give effect to the clear intent of the Legislature, the Decision must be modified to clarify that utilities may only solicit opt-outs or specify the opt-out mechanism if expressly requested to do so by a CCA program.

A. AB 117 Puts the CCA Programs in Charge of Soliciting Opt-Outs and Determining the Opt-Out Mechanism

Section 366.2(c)(11) states that “the program shall allow any retail customer to opt out.” Section 366.2(c)(13) explains how CCA programs are to carry out this responsibility. The “community choice aggregator” is required to provide customers four separate notifications, beginning 60 days before automatic enrollment, in which the CCA programs must explain the terms and conditions of the CCA services and inform customers of their right to opt out without penalty.⁴⁹ Each notification must include “a mechanism” by which customers may opt out of CCA service.⁵⁰ This mechanism “may take the form of a self-addressed return postcard” indicating an opt-out preference or “another straightforward means” of opting out.⁵¹ The only way the statute contemplates a utility

⁴⁹ Section 366.2(c)(13)(A)

⁵⁰ Section 366.2(c)(13)(C)

⁵¹ *Id.* (emphasis added).

becoming involved in the mailing of opt-out notifications is if a CCA program requests the utility's assistance under Section 366.2(c)(13)(B).

The following points are evident from these detailed provisions. First, the only means by which customers are to be informed of their opt-out right is through the four required customer notifications. Second, the CCA programs are solely responsible for sending these notifications, unless a CCA program expressly asks the utility to send the notifications. Third, by using the phrase "a mechanism," the legislature contemplates that there be only one opt-out mechanism. Fourth, the opt-out mechanism must be included in the customer notifications. Fifth, by virtue of the CCA provider's responsibility for creating and sending the customer notifications, the CCA program is responsible for determining which opt-out mechanism to use.

In sum, the CCA programs have sole responsibility for (1) soliciting opt-outs as part of the four required customer notifications and (2) determining the single mechanism by which customers may indicate an opt-out preference.

B. The Commission Should Make Clear that the Utilities Should Have No Greater Role in Soliciting Opt-Outs Than the Detailed Provisions of AB 117 Contemplate

Contrary to the detailed and prescriptive provisions of Section 366.2(c), PG&E has arrogated to itself the ability to solicit customer opt-outs. In Draft Resolution E-4250, the Commission's Energy Division has noted that PG&E has circulated marketing tri-folds with return mailers and posted a website in which it has invited customers to opt out of a CCA service, even before the CCA program had sent any customer notifications.⁵² As shown above, such utility solicitations of customer opt-outs are contrary to AB 117 in the following respects: (1) opt-out solicitations are only to be included in the four customer notifications; (2) those notifications are only to be sent by the CCA provider (unless the CCA provider requests the utility's assistance, which was not the case with PG&E's solicitations); and (3) AB 117 does not confer on the utilities an independent right to solicit opt-outs.⁵³ Accordingly,

⁵² Draft Resolution E-4250 (revised draft released Dec. 22, 2009), p. 3. In its comments on the original draft, PG&E did not deny that it attempted to solicit opt-outs using these mechanisms.

⁵³ In addition, as Draft Resolution E-4250 finds, PG&E's opt-out solicitations are premature because they precede any of the four customer notifications. CCSF agrees with the conclusion that opt-outs should not be solicited prior to the first customer notification and urges the Commission to adopt the Draft Resolution pending its consideration of the broader request in this petition to bar any utility solicitations of customer opt-outs.

the Commission should make clear that utilities may not solicit customer opt-outs at any time, unless a CCA program specifically requests that a utility send the customer notifications that include an opt-out mechanism.⁵⁴

In addition, the utility tariffs adopted pursuant to the Decision appear to be inconsistent with Section 366.2(c)(13)(C). Tariff Rule 23.1.1 purports to make the utility responsible for providing “an opt-out process to be used by all CCAs.” The rule goes on to specify that *the utility* shall offer at least two opt-out mechanisms, out of four listed options. Rule 23.1 thus appears to give the utilities responsibility for determining which opt-out mechanisms may be used by the CCA provider. Rule 23.1 violates Section 366.2(c)(13)(C) to the extent that: (1) it allows the utility, not the CCA program, to determine which opt-out mechanism to use; and (2) it requires more than one opt-out mechanism, in the face of the clear language in Section 366.2(c)(13)(C) that requires CCA providers to use a single mechanism. The Commission should thus make clear that the CCA program is solely responsible for determining which single opt-out mechanism should be offered to customers and should require the utilities to modify their tariffs as necessary to comply with this statutory requirement.

VII. THE DECISION SHOULD BE MODIFIED TO CLARIFY THAT UTILITIES ARE PROHIBITED FROM MAKING DECEPTIVE, MISLEADING, OR UNTRUTHFUL COMMUNICATIONS REGARDING A CCA PROGRAM OR PROGRAMS

The Decision already states that, if a utility fails to comply with “its duty to cooperate in good faith” under Section 366.2(c)(9), the Commission retains authority to “impose substantial penalties” and to “cooperate in any law suit that seeks material damages.”⁵⁵ There should be no dispute that a utility that makes a deceptive, misleading or non-truthful communication regarding a CCA program or programs is violating its duty to cooperate in good faith. In the interest of avoiding any unnecessary

⁵⁴ Tariff Rule 23.K.3 appears to allow utilities to accept a verbal indication of an opt-out preference from a new customer who has moved into an area served by a CCA program, even before the CCA program has sent the customer any notification of the terms and conditions of service or the customer’s opt-out right. In effect, the utility would thus be soliciting an opt-out outside of the process mandated by Section 366.2(c). Accordingly, this tariff section, and likely others, would need to be revised to be consistent with the modifications sought by this petition. The requested modifications set forth in Appendix A to this petition include a requirement that the utilities revise their tariffs as necessary to conform to the modifications adopted in response to this petition.

⁵⁵ Decision, p. 18.

litigation on this point, CCSF requests that the Commission make explicit that deceptive, misleading or non-truthful communications violate Section 366.2(c)(9) and that utilities are prohibited from making such communications. The effect will be to put utilities on clear notice that, if they engage in such improper communications, they will be subject to a complaint before the CPUC, where a CCA can obtain injunctive relief or penalties, or a civil lawsuit for damages and other available remedies.

VIII. THE DECISION SHOULD BE MODIFIED TO MAKE EXPLICIT THAT CCA PROGRAMS CAN OBTAIN EXPEDITED RELIEF FROM UTILITY VIOLATIONS OF THEIR CCA OBLIGATIONS

As previously noted, CCA programs only have an opportunity to succeed if utilities provide the full cooperation required by Section 366.2(c)(9). A breach by a utility of any of its obligations to a CCA program could quickly cause irreparable harm to the CCA program. Irreparable harm could result in a matter of days in a variety of situations, such as an unreasonable refusal by a utility to provide distribution services to CCA customers, or a well-funded marketing campaign that disparages a CCA program with which a utility is supposed to be cooperating. For this reason, CCA programs need to be able to seek and, upon a proper showing, obtain prompt interim relief in order to temporarily enjoin utilities from engaging in behavior that threatens irreparable harm.

Accordingly, the Commission should clarify that the presiding officer in a CCA complaint case has the authority to hear and grant a temporary restraining order (TRO) or preliminary injunction pending confirmation or rejection of such order by the full Commission. Such authority is contemplated by Section 310, which authorizes an individual commissioner or administrative law judge (ALJ) to issue an “order”, that is, a determination that has binding effect.⁵⁶ Under Section 310, after a commissioner or ALJ makes an order, it may then be “approved” or “confirmed” by the full commission.

⁵⁶ “Order” is defined as a “command of a court or judge.” See Dictionary.com. *Dictionary.com Unabridged*. Random House, Inc. <http://dictionary.reference.com/browse/order> (accessed: January 04, 2010).

Likewise, Rule of Practice and Procedure 9.1 authorizes ALJs to “rule upon all objections or motions which do not involve final determination of proceedings.” A TRO or preliminary injunction affords interim relief and does not make a final determination.

The Commission has followed this procedure in order to prevent irreparable harm. In *XO California, Inc. v. Northpoint Communications, Inc.*, D. 01-04-008, the Assigned Commissioner granted emergency relief, two days after the filing of the complaint, to enjoin a bankrupt telecommunications carrier from discontinuing service to its customers. The full Commission subsequently confirmed the Assigned Commissioner’s order, finding that the order was “procedurally and substantively proper.”⁵⁷

In order to provide a measure of certainty to CCA programs that they will have the opportunity to obtain prompt relief to prevent irreparable harm, the Commission should modify the Decision as requested in Appendix A.

IX. REQUEST FOR EXPEDITED CONSIDERATION

The foregoing has demonstrated that PG&E has made it a high corporate priority to prevent the successful implementation of AB 117 in California. With its December 2009 marketing efforts designed to prevent a successful CCA program in San Francisco, PG&E has undoubtedly only just begun what is sure to be a concerted campaign, yet already the resulting damage is real. As shown above, these efforts fundamentally conflict with PG&E’s duty to cooperate fully with CCA programs and interfere with CCSF’s right to pursue a CCA program. Expedited consideration of this petition is necessary to prevent PG&E from profiting from its violation of its duty and inflicting crippling and irreparable harm on the emerging CCA programs of CCSF and others.

X. PETITIONER HAS GOOD CAUSE FOR FILING THIS PETITION MORE THAN ONE YEAR AFTER THE ISSUANCE OF THE DECISION

Where, as here, more than one year has elapsed since the effective date of a decision sought to be modified, the Commission’s rules require the petitioner to explain why the petition could not have

⁵⁷ *Id.*, p. 2.

As previously explained, the Commission's resolution of the issues addressed in this petition assumed that the utilities did not oppose CCA programs. PG&E did not make clear its reversal of position until well after the one-year benchmark in the Commission's rules. In fact, only in the last few months has the depth and extent of PG&E's opposition become evident. In particular, PG&E's recent support of the two-thirds vote initiative has now clearly shown that PG&E intends to resort to aggressive and costly efforts to undermine CCA programs. PG&E's December 2009 mailer and website attacking CCSF's CCA were the first concrete demonstration that PG&E intends to conduct an extensive and broad-based campaign specifically designed to thwart San Francisco's efforts. Accordingly, the petition is timely.

For the reasons set forth in this Petition and accompanying materials, CCSF urges the Commission to expeditiously order the modifications to Decision 05-12-041 that are described in Appendix A to this Petition.

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APPENDIX
(SEE ATTACHMENTS)

CERTIFICATE OF SERVICE

I, PAULA FERNANDEZ, declare that:

I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen years and not a party to the within action. My business address is City Attorney's Office, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102; telephone (415) 554-4623.

On January 11, 2010, I served the **PETITION OF THE CITY AND COUNTY OF SAN FRANCISCO TO MODIFY DECISION 05-12-041 AND REQUEST FOR EXPEDITED CONSIDERATION** by electronic mail on all parties on the service list in **Proceeding No. R.03-10-003**.

The following addressee(s) without an email address were served:

☒ **BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on January 11, 2010, at San Francisco, California.

/S/

PAULA FERNANDEZ



California Public
Utilities Commission

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